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THE LIABILITY OF THE MAKER OF A
CHECK AFTER CERTIFICATION.¹

IN the past five years a number of articles on the law of certified checks have been printed in law periodicals. Among them are one by W. H. Bryant, in 27 *American Law Register*, N. S. 141, and one by W. F. Elliott, in 31 *Central Law Journal*, 373. Besides these, there is an able discussion of the legal questions involved, in the third edition of *Morse on Banks and Banking*, chapter xxx., printed in 1888; and in 1887 the important case of *Born v. First National Bank of Indianapolis*² was decided.

The conclusion reached in this case and by the above mentioned authors, that, if a check be certified at the instance of the maker, he is not discharged, appears to the present writer to be erroneous. The question is a narrow one, but of vital importance to the commercial world; and its solution should be placed, if possible, on broad and scientific principles of mercantile law, so that there may be no question as to its correctness.

No one in giving a check, whether certified or not, makes any representation as to the solvency of the bank, and the only case in which the question of the liability of the maker of a certified check can arise is in the event of the bank's insolvency.

If a check were a bill of exchange, there would be no question as to the maker's liability. But it is settled beyond all hope of dispute or shadow of controversy that a check, although analogous in many respects to a bill of exchange, is not a bill of exchange. Indeed, after a careful investigation of the subject, it is said in *Morse on Banks and Banking* (3d ed.), § 380: "To our mind the differential traits decidedly preponderate; and the more correct method is to treat the check as an altogether independent and distinct instrument from the bill of exchange." Chancellor Kent has pointed out some of the differences, saying:

"A check differs from a bill of exchange in several particulars. It has no days of grace, and requires no acceptance distinct from prompt payment. The drawer of a check is not a surety, but the principal

¹ This article was written before the case of *Minot v. Russ*, 31 N. E. Rep. 487, was decided.

² 123 Ind. 78.

debtor, as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for, and the drawer has no reason to complain of delay, unless upon the intermediate failure of the banker."¹

And Mr. Justice Story, delivering judgment in *In the Matter of Brown*, has expressed in the strongest terms his opinion that a check is not a bill of exchange, saying, —

"I am aware that Mr. Justice Cowen, in his elaborate opinion in *Harker v. Anderson*,² has endeavored to support the opinion that a check is to be deemed, to all essential purposes, to be a bill of exchange, and, therefore, that all the rules applicable to the latter are of equal force in relation to the former. Notwithstanding the array of authorities, so fully and learnedly brought forth by him in support of that opinion, my own judgment is that they wholly fail of the purpose. It appears to me to be a struggle on the part of the learned judge to subject all the doctrines, applicable to all negotiable instruments, to some common and uniform standard. I hope and trust that such an effort will never prevail. In my judgment, it is far better that the doctrines of commercial jurisprudence should, from time to time, adapt themselves to the common usages and practices and understanding of merchants, and vary with the varying courses of business, so as at once to subserve public convenience and to mould themselves into the common habits of social life, than to assume any artificial forms, or to regulate by any inflexible standard the whole operations of trade and commerce. As new instruments arise in the course of business, they should be construed so as to meet and accomplish the very purposes for which they were designed by the parties, and not to defeat them. Checks are as well known now as bills of exchange, as a class of distinct instruments in commercial negotiations, and he who seeks to make them identical in all respects with bills of exchange may unintentionally be introducing an anomaly instead of suppressing one. Upon the whole, my judgment is precisely in coincidence with that of Mr. Chancellor Kent."³

And again: "The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are (as it seems to me) that they are always drawn on a bank or banker; that they are payable immediately on presentment, without allowance of any days of grace; and that they are never presentable for mere acceptance, but only for payment."⁴

To the same effect is *Merchants' Bank v. State Bank*.⁵

¹ 3 Kent, Com. (13th ed.) 104, n.

² 21 Wend. 372.

³ 2 Story, 502, 517, 518.

⁴ 2 Story, 512.

⁵ 10 Wall. 604.

The following further differences between bills of exchange and checks have been adjudicated : —

A bill of exchange must be duly presented to the drawee for payment, in order to hold the drawer, whereas the drawer of a check, even if it is not duly presented, is still liable on it, unless he has been prejudiced by the delay.¹

A check was not within the first section of the Act of Congress of July 6, 1797, 1 U. S. Stat. 527, requiring bills and notes to be stamped.²

At common law the oral acceptance of a bill of exchange was good,³ but the oral acceptance of a check is not a certification.⁴

The death of the drawer of a bill of exchange has no effect upon the duties, liabilities or rights of the other parties to it, but the death of the drawer of a check revokes it.⁵

The purchaser of an overdue bill of exchange takes it subject to all equities. With regard to checks there is no such rule.⁶

In *London & County Banking Co. v. Groome*,⁷ the plaintiff had received the check, eight days after its date for collection. It was payable to bearer, and had been given to the plaintiff's depositor, who had deposited it for collection in violation of an agreement to hold and use it only as collateral security. The defendant was the maker.

Mr. Justice Field said, —

"That the holder of an overdue bill or note payable at a fixed date (appearing of course upon it) is in the position suggested [subject to all equities] is established beyond all doubt; and the reason of the rule is, that inasmuch as these instruments are usually current only during the period before they become payable, and their negotiation after that period is out of the usual and ordinary course of dealing, that circum-

¹ *Robinson v. Hawksford*, 9 Q. B. 52; *Laws v. Rand*, 3 C. B. N. s. 442; *Keene v. Beard*, 8 C. B. N. s. 372, 381; *Kinyon v. Stanton*, 44 Wis. 479. Note by Professor Ames to *Robinson v. Hawksford*, 2 Ames Bills and Notes, 729.

² *Conroy v. Warren*, 3 Johns. Cas. 259.

³ *Pierce v. Kittredge*, 115 Mass. 374.

⁴ *Morse v. Massachusetts National Bank*, 1 Holmes, 209; *Bank of Springfield v. First National Bank*, 30 Mo. App. 271; *Farmers' and Traders' Bank v. Bank of Allen County*, 12 S. W. Rep. 545; *Espy v. Bank of Cincinnati*, 18 Wall. 604, 620, 621; 2 Ames Bills and Notes, 802, § 11.

⁵ *In re Mead*, L. R. 15 Ch. D. 651; *In re Beak*, L. R. 13 Eq. 489; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Tate v. Hilbert*, 2 Ves. Jr. 111, 115, 118; s. c. 4 Bro. C. C. 286.

⁶ *London & County Banking Co. v. Groome*, 8 Q. B. D. 288; *Boehm v. Sterling*, 7 T. R. 423; *Rothschild v. Corney*, 9 B. & C. 388.

⁷ 8 Q. B. D. 288.

stance is sufficient of itself to excite so much suspicion that, as a rule of law, the indorsee must take it on the credit of, and can stand in no better position than, the indorser.¹ But with regard to checks no such rule has been laid down."²

But the greatest difference between a check and a bill of exchange lies in the fact that, when a bill of exchange is accepted by the drawee, the drawer is still secondarily liable; whereas, if the payee or subsequent holder of a check presents it to the bank for certification, and it is certified, the maker is no longer liable at all. Certification of a check is, therefore, something different from and more than the acceptance of a bill of exchange.

This is the rule of law in every jurisdiction where the question has arisen or been referred to.³

In *Metropolitan National Bank v. Jones*,⁴ which is the latest case on the subject, the plaintiff brought an action on a check which had been given to it by the defendant, and of which the plaintiff had procured certification. Mr. Justice Bailey, delivering the opinion of the court, said, —

"A check being payable immediately and on demand, the holder can only present it for payment, and the bank can fulfil its duty to its depositor only by paying the amount demanded. . . . It follows that there is no such thing as 'acceptance' of checks in the ordinary sense of the term, for 'acceptance' ordinarily implies that the drawer requests the drawee to pay the amount at a future day, and the drawee 'accepts' to do so, thereby becoming principal debtor, and the drawer becoming his surety. . . . By certification, the bank enters into an absolute undertaking to pay the check when presented at any time within the period prescribed by the Statute of Limitations. The transaction, as between

¹ *Brown v. Davies*, 3 T. R. 80.

² 8 Q. B. D. 288, 292.

³ In *Warrensburg Co-operative Association v. Zoll*, 83 Mo. 94, the check was presented by the payee to the assignee of the bank, after the bank had closed its doors, and was "accepted." It was, therefore, not certified in the regular course of business, but was merely the allowance of a claim against the insolvent bank, since in Missouri a check operates as an assignment. *State Savings Association v. Boatman's Savings Bank*, 11 Mo. App. 292. Consequently that case has nothing to do with certification.

Boyd v. Nasmith, 17 Ontario, 40; *First National Bank v. Leach*, 52 N. Y. 350; *Essex County National Bank v. Bank of Montreal*, 7 Biss. 193; *French v. Irwin*, 4 Baxt. 401; *National Commercial Bank v. Miller*, 77 Ala. 168; *First National Bank v. Whitman*, 94 U. S. 343, 345; *Born v. First National Bank of Indianapolis*, 123 Ind. 78, 79; *Metropolitan National Bank v. Jones*, 12 L. R. A. 492.

⁴ 12 L. R. N. 402.

the holder and the bank, is substantially the same in legal effect as though the holder had received payment and had deposited the money with the bank and received a certificate of deposit therefor. . . . Another result of the transaction is that the bank thereby becomes entitled to, and if its business is properly conducted actually does, charge the amount of the check to the account of the drawer at the time of the certification; thus in reality appropriating to the payment of the check the necessary amount of the money on deposit to the credit of the drawer, precisely the same as though the check were paid. As between the bank and drawer, certification has the same effect as payment, the funds representing the amount of the check being just as effectually withdrawn from the control of the drawer. . . . The question whether this change in the rights and relations of the parties should be held to discharge the drawer from further liability on the check has not, so far as we are aware, ever been before this court for decision; but the great weight of authority as found in the decisions of courts of other jurisdictions, and in the treatises of law writers of the greatest learning and ability, is in favor of the conclusion that the drawer is discharged. . . .¹

"It seems to us very clear, both upon principle and authority, that the plaintiffs in this case, by obtaining certification of their check, discharged the defendants from all liability thereon as drawers."²

In *First National Bank v. Leach*,³ where the plaintiff likewise sought to recover from the drawer of a check, which had been certified at the request of the plaintiff, Mr. Justice Peckham, in delivering the opinion of the Court, said, —

"The theory of the law is that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself. The reason therefor is so strong that the law presumes it is adopted by the banks. . . .

"It follows that after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his.

"If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it had already been appropriated by means of the check thus certified; as to him, it was precisely as if the bank had paid the money upon that check, instead of making a certificate of its being good."⁴

It is obvious, therefore, that the certification of a check is not in any way analogous to the acceptance of a bill of exchange, to

¹ 12 L. R. A. 494.

² 12 L. R. A. 495.

³ 52 N. Y. 350.

⁴ 52 N. Y. 351, 352.

which it has sometimes been loosely likened. Certification, instead of creating an additional obligation on the check itself, creates an entirely new instrument, superseding the check altogether, by reason of which the prior parties to the check are wholly discharged.

It being established that, when the holder procures the certification of a check, the maker thereof is discharged, and the reason for the rule being that the maker has lost all control of his funds to the amount of the check, and the holder has obtained a new obligation that is inconsistent with the nature or purpose of a check, it is obvious that the reason applies with equal force to the case where the maker himself procures the certification before he delivers the check to the payee. The payee in such a case takes the check solely on the obligation of the bank. A certified check is in all cases a promissory note of the bank, and has ceased to be a check at all. In other words, a certified check is a substituted obligation, the result of a novation, by which the maker is discharged. The holder or payee impliedly says, "Give me the promise of the bank, and I will discharge you;" and the maker says to the bank, "Promise the payee, and I will discharge you *pro tanto*." The check is necessarily thereby extinguished. As has been said in numerous cases, a certified check is the same as a certificate of deposit, and it is nothing more.

It seems, therefore, to be the settled law that, if the payee or any subsequent holder procures the certification, the maker is discharged. For those learned courts, which have held that if the maker procured the certification himself, he was not discharged, have admitted, when their attention was called to it, that if the payee had procured the certification, he would have discharged thereby the maker. Moreover, although the first cases on this subject arose in Illinois in 1866, — *Bickford v. First National Bank of Chicago*,¹ *Rounds v. Smith*,²—and were to the effect that the maker, where he had procured the certification himself, was not discharged, there is but one decision of any importance, *Andrews v. German National Bank*,³ that holds the same doctrine, until that of *Born v. First National Bank of Indianapolis*,⁴ in 1887. The intervening decisions are *Brown v. Leckie*,⁵ in 1867, *Mutual National Bank v. Rotgé*,⁶ in 1876, and the ruling of Mr. Justice

¹ 42 Ill. 238.

² 42 Ill. 245.

³ 9 Heisk. 211.

⁴ 123 Ind. 78.

⁵ 43 Ill. 497.

⁶ 28 La. An. 933.

Depue at *nisi prius*, in New York, Lake Erie, & Western R. R. v. Smith,¹ in 1881. Whereas in 1873, the Court of Appeals of New York held that the maker was discharged, when the payee procured the certification, in First National Bank v. Leach,² and there Mr. Justice Peckham, delivering judgment, intimated the opinion that the maker would not be discharged, if he had procured the certification himself. In 1874 French v. Irwin³ was decided, in which the Court of Tennessee reached the same conclusion as was reached in First National Bank v. Leach,⁴ and in 1876 the Circuit Court of the United States for the District of Illinois decided a case in accordance with the same doctrine.⁵ In the same year the Supreme Court of the United States stated the rule that the maker was discharged, if the certification were procured by the payee, as settled law, and intimated an opinion that there was in reality no difference between such a case and the case where the maker himself procured the certification.⁶ In 1889 came the important case of Boyd v. Nasmith,⁷ and in 1891 the still more important decision in Metropolitan National Bank v. Jones,⁸ in both of which it was held that the maker was discharged by the payee having procured the certification of the check.

There are, however, seven jurisdictions, in which it has been ruled that the maker, having procured the certification, was not discharged; and in New York a like opinion has been expressed, *obiter*, by an eminent judge.⁹

But the reasons given for the conclusion reached in these cases are by no means satisfactory; and a review of them will show, I think, that they have been placed on no tenable ground, on which to distinguish them from the cases, where the payee has procured the certification, and where it is universally held that the maker is discharged.

¹ 4 N. J. L. J. 34

² 52 N. Y. 350.

³ 4 Baxt. 401.

⁴ 52 N. Y. 350.

⁵ Essex County National Bank v. Bank of Montreal, 7 Biss. 193.

⁶ First National Bank v. Whitman, 94 U. S. 343, 345.

⁷ 17 Ontario, 40.

⁸ 2 L. R. A. 492.

⁹ Bickford v. First National Bank of Chicago, 42 Ill. 238; Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497; Larsen v. Breene, 12 Col. 480; New York, Lake Erie, & Western R. R. v. Smith, 4 N. J. L. J. 34; Andrus v. German National Bank, 9 Heisk. 211; Cincinnati Oyster & Fish Co. v. National Lafayette Bank, 4 Oh. C. C. 135; Mutual National Bank v. Rotgé, 28 La. Ann. 933; First National Bank v. Leach, 52 N. Y. 350, 353; Born v. First National Bank of Indianapolis, 123 Ind. 78.

The first of these cases, in point of time, are those in Illinois. *Bickford v. First National Bank of Chicago*¹ was decided on the distinct grounds that a certified check was not money, — a proposition which no one will deny, — and that a check was like a bill of exchange. Mr. Justice Breese said: "The question is fairly presented, whether the receipt of a certified check is of itself payment, or whether a check, upon being certified, ceases to be commercial paper and becomes money."²

It is submitted that this is not the question at all. The question is whether, by the novation, the drawer is not discharged; and it is again submitted, with all deference, that he is.

Again, Mr. Justice Breese says,—

"If, then, a check, certified or not, is like an inland bill of exchange, the drawer of this check, the appellant here, undertook on his part that the drawee, Conrad, should accept and pay, and Conrad so most emphatically promised by certifying it; and as he did not pay, the drawer is answerable, he having due notice of the non-payment. . . . Although it be the fact that certified checks pass from hand to hand as cash, still they are not cash or currency in the legal sense of those terms, and they do not lose on that account any of their characteristics as bills of exchange. . . . As the acceptance of a bill of exchange does not discharge the drawer, so neither should the acceptance of a check, manifested by the word 'good' placed upon it by the bank, discharge the drawer."³

And, as is pointed out in *Essex County National Bank v. Bank of Montreal*,⁴ this conclusion was also largely induced by the peculiar rule obtaining in Illinois, that a check operates as an assignment *pro tanto* of the maker's funds in the bank.⁵ Such a rule cannot be supported on principle, and is contrary to the weight of authority.⁶

The other two Illinois cases and the case in Colorado⁷ simply follow this first Illinois decision, the reasoning of which has been entirely refuted by the recent case of *Metropolitan National Bank v. Jones*.⁸

In *Andrews v. German National Bank*,⁹ a check is held to be in all things a bill of exchange, and certification to be only acceptance. But this reasoning is inconsistent with the later case of

¹ 42 Ill. 238.

³ 42 Ill. 243, 244.

² 42 Ill. 240.

⁴ 7 Biss. 193, 199.

⁵ *Munn. v. Burch*, 25 Ill. 35.

⁶ *Carr v. National Security Bank*, 107 Mass. 45.

⁷ 12 Col. 480.

⁸ 12 L. R. A. 492.

⁹ 9 Heisk. 211.

French *v.* Irwin,¹ in which it was held that the drawer was discharged by the certification of the check at the instance of the payee; and the controlling reason for the decision, namely, that a check was nothing but a bill of exchange, has been shown to be erroneous.

In *Cincinnati Oyster & Fish Co. v. National Lafayette Bank*,² Mr. Justice Smith said that certification is a means adopted "to satisfy those into whose hands it may come that the drawer has funds in the bank appropriated to the payment of the same. . . . In such case there is no arrangement between the holder of the check and the bank on which it was drawn, either express or implied, that he is to look to the bank alone. . . . The person so receiving it has an additional security for its payment."³

And for these reasons the maker was held liable.

It is obvious that the learned judge did not rightly understand the operation of certification. He entirely lost sight of its real effect, and simply reached the conclusion by saying what a certified check was not.

In the New Jersey and New York cases, above cited, so far as appears, they have no reasons for holding the maker liable. And in the brief report of the ruling at *nisi prius* of Mr. Justice Depue,⁴ it is extremely doubtful whether the certification of the check was not procured by the payee, in which case there can be no doubt that the learned justice was mistaken as to the law. The words of the report are: "The check was given the agent of the company [the payee and plaintiff] in Newark, and was on the First National Bank. It was certified, and then, under the rules of the company, transmitted to them in New York."

In the Louisiana decision, *supra*, the indorsers, who had procured the certification, were held liable because the learned court could think of no ground on which they could be discharged, and no prior cases are cited.

In *Born v. First National Bank of Indianapolis*,⁵ Mr. Justice Elliott, speaking for the Supreme Court of Indiana, said,—

"We agree with the appellant's counsel that the drawer of a check is released, if the holder, instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. If the holder elects to procure the certification of the check, it becomes in his hands

¹ 4 Baxt. 401.

² 4 Oh. C. C. 135.

³ 4 Oh. C. C. 137

⁴ 4 N. J. L. J. 34.

⁵ 123 Ind. 78.

substantially a certificate of deposit. By his own act he makes the bank his debtor, and releases the drawer of the check. The reason for this rule is that the moment the check is certified the funds cease to be under the control of the original depositor, and pass under the control of the person who procures the certification of the check drawn in his favor

"The principle which gives force and strength to the decisions referred to [*i. e.*, when the holder procures the certification] fails entirely, when there is no act done by the holder of the check, save that of receiving it in the form in which it is presented, for the element which sustains those decisions is, that the holder, by procuring the certification of the check, after he becomes the owner, voluntarily makes the bank upon which it is drawn his debtor, thus releasing the drawer."¹

The above quotations from the opinion, and the additional proposition that certification is not an assurance that the bank is solvent, are the grounds upon which the case was decided. And in reaching the conclusion, the court were strongly impelled by the hallucination that they would be making a check equivalent to money, if they held that the drawer was discharged. No suggestion is made of any legal difference between the case decided and the case, in which it is admitted that the drawer would be discharged, where the holder procures the certification himself. Of course, the latter is the stronger case, for there is an additional argument in reaching the conclusion than in the former case, in that the payee has done an act himself. But the legal effect of certification must be the same in all cases. In one instance, a certified check cannot be a new instrument substituted for the check, a promissory note of the bank, with all the legal results attending it, and in the other, the old obligation, an entirely different instrument, with the original rights and liabilities; for on their face they are both the same instrument, a certified check, and it would be impossible for an indorsee to know what obligation he was buying. Unless there is some valid reason for making such a distinction, it clearly should be avoided; for it would open the door to fraud, confusion and injustice. The indorsee of a check would be compelled to bring suit against the maker before he could ascertain what rights he had.

Opposed to these seven jurisdictions is a *dictum* of the Supreme Court of the United States in *First National Bank v. Whitman*,² where Mr. Justice Hunt, delivering judgment for the court, said:

¹ 123 Ind. 79, 80.

² 94 U. S. 343.

"Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance."¹

Without standing as sponsor to all the sentiments or lurid and bad English contained in a communication to the Central Law Journal relative to *Born v. First National Bank of Indianapolis*,² I quote the material part of it to show the strong feeling that exists that that case was wrongly decided:—

"We think the reasons assigned in this opinion for this distinction are insufficient and untenable. The opinion is not in harmony with the doctrine of *stare decisis*. It is true, as stated in the opinion, that previous decisions on the questions may have been upon checks certified by the bank at the request of the holder, and not at the request of the drawee [payee]. But this makes no difference, so far as the law of the case is concerned, according to the reasoning of these prior adjudicated cases. These decisions, holding such checks to be payment, assign as a reason in justification of such holding that 'the moment the check is certified, the funds cease to be under the control of the drawer, and pass under the control of the drawee [payee] thereof.' Now, does not the reason assigned for the decisions upon such checks heretofore made apply with equal force, whether certified before or after delivery to the drawee [payee]? And does not the acceptor of a check thus certified know, or is he not bound to know, that the law makes such a check payment because, according to judicial reasoning (Judge Elliott's opinion excepted), the moment the check is certified the funds cease to be under the control of the drawer, and pass under the control of the drawee [payee]? It should be the aim of the courts to adopt, so far as it can be done, a general rule to apply to all cases *in pari materia*, instead of torturing the brain to hunt up some fancied distinction, and endeavor to support and sustain such distinction by specious and puerile reasoning. This judicial course may give *éclat* to the writer of the opinion, by making it appear, to superficial observers only, that he has solved and set at rest an open question, but it destroys and mutilates the harmony of legal jurisprudence."³

It being established that in one case a certified check is not a check, but a promissory note of the bank, a certificate of deposit, and that all prior parties thereto are discharged, it must follow that there is the same result in every case of a certified check, unless the law is to revel in distinctions without differences, and in dis-

¹ 94 U. S. 345.

² 123 Ind. 78.

³ 31 Central Law Journal, 93.

tinctions which no court has yet been able to state ; and surely no banker would ever think of making a distinction. It is a manifestly harsh and inequitable rule to compel the maker of a check to be liable on it, and yet to hold, as it must be held, in the light of the authorities, that he could not recover from the bank ; for it is universally held that the amount of a certified check has passed beyond the control of the depositor ; and consequently as to that amount the bank owes no duty to the depositor. If, therefore, the maker is held liable in either case, he is compelled to assume the risk of the bank's insolvency, and yet has no power to protect himself from that insolvency in the only way possible, namely, by a withdrawal of his deposit ; and therefore there should be some good and cogent legal reason to support such a conclusion. Such a result most certainly would not be consonant with business usages or understanding, and would be contrary to every principle, both mercantile and equitable.¹

In *Essex County National Bank v. Bank of Montreal*,² Judge Hopkins says,—

“ By this act [certification] a new relation was created between the parties. The amount the check called for was withdrawn from the drawer's account and control, and thereafter they had no right of action for it against the bank. The technical operation was a transfer to the holder of the check of the drawer's funds and right of action for it against the bank. . . . It superseded the previous rights and obligations of the parties, and particularly of the drawers. Before that, the drawers could have stopped payment of the check or withdrawn the funds by other checks. After the certification, they had no control over the fund or action of the bank in reference to it, nor any right to sue the bank for it. Nor did the bank owe them any duty in relation to it. It no longer possessed the character of a check.”³

Moreover, if in one case the effect of certification is a novation, by which the maker is discharged, as it has been shown that it is by the settled law, the same effect must follow in the other case, since the act is the same, and the instrument is identical in every respect. It is impossible for the same act to have two legal consequences, or for negotiable instruments, ostensibly the same, to import different rights.

Francis R. Jones.

¹ *Freund v. Importers and Traders' Bank*, 76 N. Y. 352 ; *Essex County National Bank v. Bank of Montreal*, 7 Biss. 193.

² 7 Biss. 193.

³ 7 Biss. 193, 195, 196.